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No. 03-814

IN THE

Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the First Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

What is the legal standard for determining whether a watercraft is a Jones Act vessel?

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae* in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.[1]

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1 Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 lawyer members primarily represent injured plaintiffs in civil actions. The Admiralty Law Section of the Association includes most of the attorneys who specialize in representing plaintiffs in maritime personal injury litigation.

The Jones Act, 46 U.S.C. App. § 688(a), affords a remedy to seamen and their families to seek compensation for injury or death caused during the course of their hazardous work. The issues in this case affect the question of who may qualify as a Jones Act seaman. One of the tenets of ATLA's mission is to preserve the rights of all citizens, including seamen, to legal recourse for injury.

SUMMARY OF THE ARGUMENT

1. In order to qualify as a seaman under the Jones Act, a worker must have a substantial employment connection to a *vessel* in navigation or an identifiable fleet of such vessels. The Jones Act, 46 U.S.C. App. § 688(a), contains no definition of the word "vessel" and the definition found in the Longshore & Harbor Workers Compensation Act, 33 U.S.C. § 902(21), is of no help. This Court's decisions which fashioned the present test for seaman status do not define the term "vessel." *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991). The lower courts' decisions on this subject are mired in confusion and contradiction. There is a need for this Court to provide a clear and straightforward definition of the term "vessel" for the purpose of determining seaman status.

2. The test used by the court below denies Jones Act vessel status to special-purpose vessels whose mission is not primarily transportation of passengers or cargo over navigable waters unless that vessel is in transit at the moment of the worker's injury. This test is untenable because:

A. The artificial distinction it draws between traditional and special-purpose vessels is not supported by logic or by law. There is no principled basis for such a distinction because:

(1) Maritime law has long recognized that there are "myriad purposes for which ships set to sea," *Wilander, supra,* at 344, and the transportation of passengers or cargo over navigable waters is only one of these. Maritime law has long recognized that unconventional as well as traditional vessels serve the varied purposes of maritime commerce.

(2) There is no meaningful difference between traditional and special-purpose vessels insofar as the connection required between the vessel and the crew which serves her. The crews of both are required to have an employment connection to the vessel that is substantial in both nature and duration. The crew members of both are required to contribute to the mission of the vessel.

(3) There is no meaningful difference in the exposure to marine perils suffered by the crews of traditional and special-purpose vessels.

(4) This Court's prior decisions have consistently held or assumed special-purpose craft to be vessels.

B. The test used by the court below focuses on the circumstances existing at the moment of injury and is therefore the kind of "snapshot" test forbidden

by the *Chandris* Court. Thus, the test provides no predictability to employers, workers or insurers as to who, on any given workday, is covered by the Jones Act and who is covered by LHWCA.

3. The definition of the term "vessel" found in 1 U.S.C. § 3, when used in conjunction with the other prongs of the seaman status test established in *Chandris*, is an appropriate test for Jones Act vessel status. 1 U.S.C. § 3 states: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation over water."

4. A separate prong of the test for seaman status set out in *Chandris* requires the vessel to be "in navigation." This Court has made clear that the "in navigation" requirement does not require the vessel to be in transit in order for it to be a vessel. Rather, a vessel is "in navigation" as long as it has not been removed from navigation for such a lengthy period of time that it must be considered out of service. Put another way, a vessel is "in navigation," even if stationary for long periods, as long as it is performing its intended function.

5. A Jones Act vessel is, therefore, any kind of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation. This definition is consistent with this Court's prior decisions; it is clear, straightforward and allows for predictability; it takes into account the great variety of watercraft engaged in maritime commerce and the varied missions in which they participate in maritime commerce; and finally, it serves the underlying policy of the Jones Act.

ARGUMENT

I. THERE IS A NEED FOR A CLEAR AND SIMPLE DEFINITION OF THE TERM "VESSEL"

In its recent decisions addressing the issue of seaman status, this Court has done much to bring clarity and predictability to this difficult area. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991), considered the nature of the work that an individual must do aboard a vessel in order to qualify for the protection of the Jones Act, 46 U.S.C. App. § 688(a). Two starkly different views were presented: that of the Seventh Circuit, which required a worker to aid in the navigation of the vessel in order to be a seaman, *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. den.*, 469 U.S. 1211 (1985), and that of the Fifth Circuit, which granted seaman status to those whose work contributed broadly to the function or mission of the vessel, *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

This Court concluded that the Fifth Circuit in *Robison* had "deciphered" the Court's earlier decisions and "correctly found that . . . this Court was no longer requiring that seamen aid in navigation." The Court found that to be a seaman, a worker must merely "contribut[e] to the function of the vessel or the accomplishment of its mission." *Wilander* at 498 U.S. 354-355, quoting *Robison*, 266 F.2d 769 at 779. While the Court emphasized that the employment-related connection to a vessel was the "key to seaman status," it found it unnecessary to further "define this connection in all details." *Wilander, supra,* at 355.

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995), presented the Court with the opportunity to elaborate on the nature of that connection. This Court again turned to *Robison* for guidance, quoting Judge Wisdom's formulation of the test for seaman status.

> [T]here is an evidentiary basis for a Jones Act case to go a jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

Chandris, supra, at 365-366, quoting *Robison* at 779.

Building upon and refining that formulation, the Court reiterated the requirement that an employee's duties must "contribute to the function of the vessel or the accomplishment of its mission," *Chandris, supra,* at 368, quoting *Wilander, supra,* at 335, which, in turn, was quoting *Robison, supra,* at 779. With respect to the connection requirement, the Court stated: "Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in both its duration and nature." *Chandris, supra,* at 368.

The Court emphasized that the fundamental purpose of the substantial connection requirement is to distinguish between land-based and sea-based employees and to give the added protection of

seamen's remedies to those employees who, because they are sea-based, are exposed to marine perils. *Id.* at 368.

Neither *Wilander* nor *Chandris* described the "vessel" to which the worker must have a substantial connection in order to be a seaman. The Jones Act does not define the term "vessel" and the definition of that term found in the LHWCA is tautological.[2] As is documented in Stewart's Petition for Certiorari, irreconcilable conflict and confusion exist among the various courts that have attempted to define this critical term.

Thus, there is a need for this Court to adopt a definition of the term "vessel" that is consistent with its earlier decisions and true to the fundamental purpose of its *Chandris* test: to fairly distinguish between sea-based and land-based workers. This vessel-status test should be clear, easy to apply, and provide predictability. It should be consistent with the underlying policy of the Jones Act and consistent with existing statutory definitions of the term. Finally, the test should be broad enough to capture the myriad watercraft which now or in the future will be used in maritime commerce and whose crew members are "sea-based" and thus exposed to marine perils.

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[2] "Unless the context requires otherwise, the term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner *pro hac vice*, agent, operator, charter [*sic*], or bareboat charterer, master, officer or crew member." LHWCA, 33 U.S.C. § 902(21).

II. THE PROPOSED STANDARD FOR A JONES ACT "VESSEL"

The definition of "vessel" found in 1 U.S.C. § 3, in combination with the other prongs of the *Chandris* seaman status test, meets these needs and captures the long understood meaning of that term in the general maritime law:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation over water.

1 U.S.C. § 3.

Robison, the landmark Fifth Circuit case utilized and endorsed by this Court in fashioning the *Wilander/Chandris* test for seaman status, also provides guidance for defining the term "vessel" and supports the adoption of 1 U.S.C. § 3 as the appropriate standard. Robison was injured while working as a roughneck aboard a mobile oil drilling rig located in the Gulf of Mexico. The drilling barge, Offshore No. 55, was fitted with retractable legs so that it could be towed into position by tugboats, where the legs would then be lowered to the ocean floor and the rig raised above water level by hydraulic jacks. The rig floor would then be used as a drilling platform. The rig was in this position at the time of Robison's accident.

The defendant argued, *inter alia*, that Offshore No. 55 was not a vessel. *Robison, supra,* at 773 n.3. Judge Wisdom first reviewed *Gianfala v. Texas Company*, 350 U.S. 879 (1955) (*per curiam*) and the four decisions cited therein.[3] He concluded:

> There are common denominators in *Gianfala*, *Basset*, *Summerlin*, *Wilkes*, and *Gahagan* decisions [sic]. (1) The claimants are not ordinarily thought of as 'seamen' aboard 'primarily in aid of navigation,' although they may serve the vessel in the sense that the work they perform fits in with the function the vessel serves. . . . (2) The 'vessels' were not conventional vessels but special-purpose structures that in one case was on the bottom of the sea. In other words, *under the Jones Act a vessel may mean something more than a means of transport on water*.

Robison, supra, at 776 (emphasis added).

After then reviewing a series of other Supreme Court decisions, including *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957); *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1948); and *Butler v. Whiteman*, 356 U.S. 271 (1958), the court issued its test for seaman status quoted above. In that test the court included within the term vessel "special purpose structures not usually employed as a means of transport by water but designed to float on water." *Robison, supra,* at 779. The court in *Robison* recognized that there are many kinds of vessels which serve maritime commerce in a variety of ways and that the transportation of passengers

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[3] *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940); *Summerlin v. Massman Const. Co.*, 199 F.2d 715 (4th Cir. 1952); *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (6th Cir. 1953); *Gahagan Const. Corp. v. Armao*, 165 F.2d 301 (1st Cir. 1948).

and cargo is only one. In *Wilander* this Court agreed, noting that there are "myriad purposes for which ships set to sea." 498 U.S. at 344. The broad language of 1 U.S.C. § 3 gives courts the necessary flexibility to appropriately consider the vast array of circumstances under which different kinds of watercraft do their work.

The vessel-status test used by the court below, on the other hand, draws an artificial distinction between craft whose primary purpose is to transport passengers or cargo over water and those special-purpose vessels which serve some other purpose. *Stewart v. Dutra Construction Company, Inc.*, 230 F.3d 461, 476 (1st Cir. 2000), relying on *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992) (*en banc*). According to this test, a vessel which does not have transportation as its primary function is a Jones Act vessel only if it is under way at the time plaintiff is injured. *DiGiovanni, supra,* at 1123. There is no legitimate support in logic or in law for such a distinction.

Both traditional and special-purpose craft must, at some point, move over water to perform their missions, but there are also times in the normal operations of both kinds of craft when they are stationary.[4] A Jones Act vessel does not lose its

[4] The times and circumstances during which these craft are stationary vary widely. For cargo vessels, for example, it may be as short as hours while the vessel is docked or as long as months while the vessel undergoes repairs. For a drilling vessel, it may be as short as a few days while it is re-provisioned between jobs, or weeks while it performs its drilling operations.

status as such merely because it is stationary.[5] While one prong of the *Chandris* test requires a vessel to be "in navigation," 515 U.S. at 368, this Court made it clear that the phrase is not meant in a narrowly literal sense. It does not require the vessel to be under way; a vessel is "in navigation" unless it has ceased to do its normal work for such a lengthy period of time that it must be considered out of service. *Id.* at 372-376. Put another way, a vessel remains "in navigation" even if not under way, as long as it is performing its normal and expected functions on navigable waters.[6]

The vessel in *Chandris* had been placed in dry dock for a six-month refurbishment. *Id.* at 351. The

[5] *See* Robert Force and Martin J. Norris, THE LAW OF SEAMEN ch. 2:11 (5th Ed. 2003), and cases collected therein.

[6] A vessel is in navigation as long as it is performing its work on water, whatever that work is, and retains that status until and unless it is "withdrawn from navigation," *Gonzales v. United States Shipping Board*, 3 F.2d 168, 171 (E.D.N.Y. 1924), or "taken out of service," *Wayne Construction, Inc. v. Lenard*, 1995 WL 309188 at *3 n. 2 (9th Cir. 1994) (unpublished). *See also Leonard v. Transoceanic Sedco Forex*, 189 F. Supp. 2d 627, 629 (S.D. Tex. 2002) (a vessel "is in navigation if it is engaged in its expected duties on navigable waters); *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1063-64 (7th Cir. 1984) (defining "in navigation" as "engaged as an instrument of commerce or transportation on navigable water"); *Fuller v. Pacific Gulf Marine, Inc.*, 1987 WL 17234 at *3, 1998 A.M.C. 470 (E.D. Pa. 1987) (same); *Rogers v. M/V Ralph Bollinger*, 279 F. Supp. 92, 94-95 (E.D. La. 1968) (same); *cf. Lewis v. Roland E. Trego & Sons*, 501 F.2d 372, 374 (4th Cir. 1974) (holding that a construction barge was in navigation "while moored in navigable water to give the workmen access to offshore piling"); *Davis v. Sedco Forex*, 660 F. Supp. 85, 86 (E.D. Pa. 1987) (holding that a floatable oil drilling rig was in navigation while stationary in drilling mode).

district court instructed the jury that, in considering Latsis' time serving aboard the vessel, it was not to consider the time he served during those six months "because during that period of time [the vessel] was out of navigation." *Id.* at 372-373. This Court found the instruction improper and remanded for a trial on the issue of whether the six-month refurbishment was of sufficient length and the repairs of significant magnitude to have removed the vessel from navigation. This Court concluded that the "inquiry whether a vessel is or is not 'in navigation' for Jones Act purposes is a fact-intensive question that is normally for the jury and not the court to decide." *Id.* at 373.

In respect to the other prongs of the *Chandris* test, the distinction drawn by the court below and in *DiGiovanni* between traditional and special-purpose vessels is equally false. The crews of both kinds of vessels must have substantial connections to their craft. The crews of both are exposed to marine perils whether or not the craft is under way. Indeed, as pointed out by the court in *Robison*, the crews of special-purpose vessels sometimes suffer greater risks than their "blue-water" counterparts.

> Many of the Jones Act seamen on these [drilling] vessels share the same marine risks to which all aboard are subject. And in many instances Jones Act seamen are exposed to more hazards than are blue-water sailors. They run the risk of top-heavy drilling barges collapsing. They run all the risks incident to oil drilling.

Robison, supra, at 780.

These marine risks are present whether the special purpose craft is stationary or under way. The facts in this case dramatically illustrate the point.

On the day Stewart was injured, the vessel "lay idle." 230 F.2d at 464. As Stewart attempted repairs on one of the scows attending the dredge, the scow collided with the dredge, causing Stewart to fall headfirst to a deck below. *Id.* at 465.[7]

Thus, in terms of applying the seaman status test set out in *Chandris*, there is no principled basis for distinguishing between vessels whose primary purpose is transporting passengers or cargo and non-traditional vessels which serve some other purpose. A special-purpose vessel, like a traditional vessel, does not lose its Jones Act vessel status merely because it is stationary. A craft, be it traditional or special-purpose, is a Jones Act vessel if it is "used, or capable of being used, as a means of transportation over water" (1 U.S.C. § 3).

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[7] The jurisprudence is replete with cases where seamen have been injured by maritime perils while working on vessels which have been secured. *See, e.g.*: *McFarland v. Justiss Oil Co., Inc.*, 526 So. 2d 1206 (La. App. 1988), where plaintiff fell into the water from a pontoon barge attached to an oil rig; *Miller v. International Diving and Consulting Services, Inc.*, 669 So. 2d 1246 (La. App.1996), where the plaintiff diver was injured when the ladder he was using to board a pipe-laying barge shifted and twisted; *Melancon v. I.M.C. Drilling Mud*, 282 So. 2d 532 (La. App. 1973), where the plaintiff was crushed while trying to transfer large metal containers onto an oil rig from a moored vessel; *Feliciano v. Texaco, Inc.*, 2002 WL 1159700 (E.D. La. 2002), where plaintiff, a crane operator on a spud barge, was injured when a tugboat tied to the barge to help with operations moved prematurely, causing the line to trap plaintiff's leg.

III. THE PROPOSED TEST IS CONSISTENT WITH SUPREME COURT JURISPRUDENCE.

The test proposed by *amicus* is entirely consistent with this Court's cases which, in a variety of circumstances, have either held or assumed special-purpose craft to be vessels. *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock Co.*, 513 U.S. 527 (1995), considered whether admiralty jurisdiction existed under the Admiralty Extension Act (AEA), 46 U.S.C. App. § 740, which extends admiralty jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water." The vessel in question was a crane barge which, when doing its repair work on bridges spanning the Chicago River, was secured by legs or spuds driven into the river bottom. 513 U.S. at 530. This Court held that admiralty jurisdiction existed under the AEA because the damage had been "caused by a vessel [*i.e.*, the spudded-down crane barge]." *Id.* at 535.

In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) (*Gizoni I*), the Court reversed a summary judgment which had declared a shipyard worker who spent most of his time aboard a fleet of "floating barges" not a seaman. The Court held that the barges in question ("several floating barges, including a pontoon barge, two float barges, a rail barge, a diver's barge, and a crane barge," 502 U.S. at 83), could be Jones Act vessels. *Id.* at 92. The summary judgment was found inappropriate on the vessel status issue because plaintiff had alleged sufficient facts to support a jury finding that the barges were vessels.

Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957), upheld the Jones Act verdict in favor of a "handyman" who was injured on land while the dredge to which he was assigned was tied to shore. The worker's duties were principally to maintain the barge. He lived ashore, went home every night and had never been aboard the dredge while it was being moved.

Gianfala v. Texas Co., 350 U.S. 879 (1955), reversed the Fifth Circuit's denial of seaman status to a crew member of a submersible drilling barge which was, at the time of plaintiff's injury, submerged and secured on the seabed. The drilling barge had ordinarily been moved once a year and the plaintiff had no duties connected to the barge's movement. This Court held that a jury finding in favor of seaman status must be reinstated.

Grimes v. Raymond Concrete Pile Co., 356 U.S. 252 (1948), involved a pile driver employed by a construction company hired to build a permanent offshore radar tower to be fixed to the sea floor. Plaintiff lived and worked on the tower as it was towed some 110 miles out to sea and then assisted in the operations necessary to secure it. During this work, he regularly worked on a nearby construction barge. Plaintiff was injured while being transferred from a tug to the tower. This Court reversed a lower court ruling denying seaman status to the plaintiff and remanded for a jury trial.

Norton v. Warner Co., 321 U.S. 565 (1944), held that a general handyman who worked and lived aboard a barge was excluded from coverage under the LHWCA as a member of the barge's crew. The Court emphasized that plaintiff "had that permanent

attachment to the *vessel* which commonly characterizes a crew." *Id.* at 573. (Emphasis added)

Ellis v. United States, 206 U.S. 246 (1907), involved the criminal prosecution of dredge operators for the violation of a statute which prohibited contractors engaged in federally funded public works projects from permitting their "laborers and mechanics" to work more than eight hours per day. Seamen were excluded from the reach of the statute. The Court reversed the convictions and relied upon 1 U.S.C. § 3 to find that the dredges were vessels and thus those employed aboard them were seamen. *Id.* at 259-260.

IV. THE PROPOSED TEST IS CLEAR AND SIMPLE AND ALLOWS FOR PREDICTABILITY.

A driving force in this Court's creation of the substantial employment connection prong of its seaman status test was to allow employers, workers and insurers "to predict who will be covered by the Jones Act and . . . who will be covered by the LHWCA . . . before a particular workday begins." *Chandris, supra,* at 363. *See also Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 558 (1997). This goal is no less important in the test for vessel status.

The test used by the First Circuit in this case provides no predictability: vessel status hinges on whether, at the moment of the accident, the craft is under way. This is the very kind of "snapshot test" forbidden by the *Chandris* Court. If allowed, it would inevitably result in the "oscillation" between coverage under the Jones Act and LHWCA that this Court was attempting to avoid. *See Chandris*, 515 U.S. at 347. By contrast, the standard set by 1

U.S.C. § 3 is clear, straightforward and easy to apply. It provides the predictability required by *Chandris* and *Papai, supra*.

The definition of "vessel" in 1 U.S.C. § 3 avoids the confusion and contradiction inherent in other tests. An excellent example of this confusion is found in the unfortunate degeneration of the *Robison* test in the Fifth Circuit. Since *Robison*, the test for Jones Act vessel status has evolved into an elaborate and complex multi-layered test which includes a host of considerations including the purpose for which the device was constructed and being used (*e.g.*, whether its "transportation function" was "primary" or "merely incidental"); whether it was moored at the time of the accident and, if so, for how long; and finally, no less than nine additional factors including whether the vessel (1) had navigational aids, (2) had a raked bow, (3) had lifeboats and other life-saving equipment, (4) had bilge pumps, (5) had crew quarters, (6) had Coast Guard registration, (7) moved on a regular basis, (8) had the ability to be refloated, and finally (9) the length of time the structure had been in place. *See, e.g., Bernard v. Binnings Const. Co., Inc.*, 741 F.2d 824, 829-33 (5th Cir. 1984).

The main difficulty with this "test" is that it is so "prolix and flabby" it really is not a test at all.[8] This conclusion is driven home by cases purporting to apply this test to essentially identical facts but reaching opposite results. Compare, for instance, *Sharp v. Johnson Bros. Co.*, 917 F.2d 885 (5th Cir. 1990), and *Ellender v. Kiva Const. and Engineering*,

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[8] David W. Robertson, *The Law of Seaman Status Clarified*, 23 J. Mar. L. & Com. 1, 14-15 (1992).

909 F.2d 803 (5th Cir. 1990), dealing with platform barges. Similarly irreconcilable decisions applying the current Fifth Circuit test are *Manual v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (CA5 1998) and *Hurst v. Pilings and Structures, Inc.*, 896 F.2d 504 (CA11 1990).[9]

Manual, supra, represents the Fifth Circuit's most recent attempt to bring order to the Fifth Circuit chaos. And it does indeed restore some order. But the *Manual* panel could not effect full repairs, and the difficulties in the Fifth Circuit's body of vessel-status doctrine run deep. This is demonstrated by comparing the reasoning of the Fifth Circuit panel in *Manual* with that of the district judge in the same case at 1996 WL 736993 (E.D. La. 1996).

In the district court, Judge Porteous reviewed the facts and, applying the Fifth Circuit's complex vessel-status doctrine, concluded that, *as a matter of law*, the drilling rig in question was *not* a vessel. In the Fifth Circuit, the Court performed the same analysis and concluded, *as a matter of law*, the drilling rig *was* a vessel. These exactly opposite results reached by two conscientious judges looking at the identical facts are a testament to the unworkability of the test they were attempting to apply. The proposed test presents no such difficulties.

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[9] *See* Robertson, *supra* n.8 for a discussion of cases.

V. THE PROPOSED TEST TAKES INTO ACCOUNT THE GREAT VARIETY OF WATERCRAFT ENGAGED IN MARITIME COMMERCE.

The Court in *Wilander* recognized that maritime commerce has been served, from its earliest days, by a limitless variety of craft serving "the myriad purposes for which ships set to sea." *Wilander, supra,* at 344.

> In the early periods of maritime commerce, when the oar was the great agent of propulsion, vessels were entirely unlike those of modern times – and each nation and period has had its peculiar agents of commerce and navigation adapted to its own wants and its own waters, and the names and the descriptions of ships and vessels are without number.

Id. at 344-345, quoting E. Benedict, AMERICAN ADMIRALTY, § 241, pp.133-134 (1850).

As technology has expanded, so have the kinds of vessels and the purposes to which they are put. Judge Eugene Davis of the Fifth Circuit has described the efforts of maritime courts to classify the ever-changing kinds of craft utilized in the offshore and inland exploration for oil and gas:

> Admiralty judges face no greater challenge than that of adapting principles of general maritime law to the changing technology in structures claiming to be vessels in navigation, particularly in the context of determining whether a worker is a seaman. Early decisions struggled with maritime issues arising with dry docks, canal boats, wharf boats, and retired liberty ships. In addition, the search for oil and gas under inland and offshore waters has changed the face of

admiralty law. Admiralty judges have considered the status of jack-up drilling rigs, submersible drilling rigs, semisubmersible drilling rigs, drill ships, pipelaying barges, derrick barges, compressor stations, fixed platforms, tenders with widowmakers, spud barges, a quarterboat barge serving as a floating hotel, a submarine pipe alignment rig, and a spar, or 'a nautical structure designed to float with the bulk of the hull below the waves – something akin to a giant buoy.' In other contexts, admiralty judges have considered structures such as museum ships, caissons, floating construction platforms, a tractor trailer transporting a house across a frozen lake, floating casinos, crane barges, a submerged cleaning and maintenance platform used to clean the hulls of vessels, and a vessel mock-up that was used to film the movie TORA, TORA, TORA. Claims have even been made that helicopters should be considered vessels.

Hon. W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenge Facing the Admiralty Judges of the Lower Federal Courts*, 75 Tul. L. Rev. 1355, 1375 (2001) (citations omitted).

New types of vessels continue, and will continue, to be developed and used in maritime work.[11] As the Court in *Robison* sagely noted, it has

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[11] *See e.g.*, *Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 353 (5th Cir. 1999) (describing the "Neptune Spar"); *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 n.1 (9th Cir. 1983) ("submerged cleaning and maintenance platform"); *Fox v. Taylor Diving and Salvage Co.*, 694 F.2d 1349, 1351 (5th Cir. 1983) ("submarine pipe alignment rig"); *McKay v. Offshore Speciality Fabricators, Inc.*, 1997 WL 289365 (E.D. La. 1997) ("tension leg wellhead platform"); *Gumpert v. Pittman Const., Inc.*, 736 So. 2d 1026, 1030 (La. App. 1999) ("self-propelled transportation platform").

been the absence of any narrow or restricted rule of law governing seaman status which has "enabled the law to develop naturally along with the development of unconventional vessels." *Robison*, 266 F.2d at 780. The proposed test is broad and inclusive enough to capture this wide variety of vessels, now and in the future.

VI. THE PROPOSED TEST FURTHERS THE UNDERLYING POLICY OF THE JONES ACT.

The "congressional purpose of the [Jones Act] is 'the benefit and protection of seamen who are peculiarly the wards of admiralty.'" *Cox v. Roth*, 348 U.S. 207, 209 (1955), quoting *The Arizona v. Anelich*, 298 U.S. 110 (1936). The Jones Act is thus "entitled to a liberal construction to accomplish its beneficent purposes." *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 790 (1949).

The proposed test is consistent with this policy underlying the Jones Act because it provides the protections of that law to those sea-based workers who, as a regular part of their employment, are exposed to marine perils, regardless of whether the vessels they serve are traditional or special-purpose vessels.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the court of appeals, and to establish a vessel status test as proposed hereinabove.

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